

Charles R. Baker
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of FAA Contract Award]
FILE: B-199706 DATE: February 5, 1981

MATTER OF: ASC Associates

DIGEST:

Bid which offered "Delivery -- 75-90 days ARO" was properly rejected as nonresponsive where IFB required delivery within 75 days after awardee's receipt of contract.

ASC Associates protests the award of a contract to the W. S. Goff Company, Inc. (Goff) under invitation for bids (IFB) No. DTFA03-80-B-00031, issued by the Federal Aviation Administration (FAA) for the acquisition and installation of Steelcase 900 Series lateral files, or equal.

The lowest of the four bids received was submitted by ASC, which offered a Canadian product as the equal of the brand name item. The second low bidder, Goff, offered the Steelcase brand name product. On the second page of the Standard Form 33 accompanying its bid, Goff represented that it was a regular dealer in the supplies offered, that it was a small business concern and that it was offering supplies manufactured by a small business concern in the United States, its possessions or Puerto Rico.

Since the firm submitting the low acceptable domestic bid represented itself to be a small business concern, the contracting officer applied a 12 percent Buy American differential to ASC's bid. See Federal Procurement Regulations (FPR) § 1-6.104-4. Thus evaluated, Goff displaced ASC as the low bidder.

ASC's president called the contracting officer after bid opening to ascertain the results. She objected when

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told by the contracting officer that a 12 percent differential had been applied to ASC's bid, arguing that a six percent factor should have been applied (in which case ASC would remain low). On the following day, she again called the contracting officer to bring to his attention our decision B-164396, August 6, 1968, which supported ASC's position. However, she was told that award had been made to Goff late the preceding afternoon. ASC then protested to the FAA and to our Office.)

(The FAA concedes that it incorrectly applied a 12 percent Buy American factor because, as pointed out in our decision B-164396, supra, and FPR § 1-701(d)(3), the preferential treatment reserved for small business concerns (application of the 12 percent factor) is available only if a small business non-manufacturer furnishes in the performance of the contract the domestically-manufactured product of a small business manufacturer. Although Goff represented in its bid that it was offering supplies manufactured by a small business concern, there appears to be no question that Steelcase is a large business. Therefore, Goff is not entitled to the preferential treatment and a six percent Buy American evaluation factor should have been applied to ASC's bid, which would not have affected the standing of the bidders.)

However, the FAA argues, ASC was not prejudiced by the error in the Buy American evaluation since ASC took exception to the delivery schedule, thereby making its bid nonresponsive. The FAA's argument is based upon the fact that in a cover letter accompanying its bid, ASC stated "Delivery -- 75-90 days ARO" whereas the IFB required that delivery be made within 75 days of the contractor's receipt of the contract. The FAA contends that since the delivery schedule is a material requirement of the contract, and since ASC's bid, if accepted, would have extended the schedule by 15 days, the bid was nonresponsive and was not eligible for award irrespective of the outcome of the Buy American evaluation.)

The protester would have us disregard as "excuses" and "afterthoughts" the FAA's arguments concerning the responsiveness of its bid. Alternatively, ASC contends that in stating "Delivery -- 75-90 days ARO" it did not preclude a 75-day delivery period and in fact would have confirmed that as a firm delivery period if asked by the contracting officer after bid opening. Finally, the protester maintains that the award to Goff was improper for two reasons: (1) Goff submitted

a "fraudulent" bid in that it incorrectly represented that it was supplying the product of a small business manufacturer and (2) Goff was given an 83-day delivery schedule even though ASC's bid was characterized as nonresponsive because of its offer of a 75 to 90-day delivery schedule.]

Certainly, [ASC's protest concerning the application of the 12 percent Buy American factor led to a re-examination of the bids, including the 75 to 90-day delivery schedule contained in ASC's cover letter. The fact that this provision was not instrumental in the initial decision to award the contract to Goff does not mean that the agency may disregard it upon reconsideration. In fact, had the agency disregarded this portion of ASC's bid and proceeded with an award to that firm, it would have been improper.]

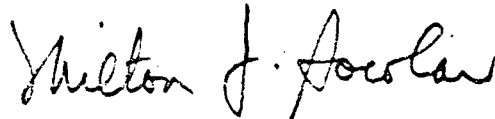
This Office has held many times that [in formal advertising the contract awarded to one bidder must be the contract offered to all bidders and only those deviations which are immaterial and do not go to the substance of the bid so as to prejudice the rights of other bidders may be waived. See, e.g., Integrated Research and Information Systems, B-196456, February 13, 1980, 80-1 CPD 130; Charles V. Clark Company, Inc., 59 Comp. Gen. 296 (1980), 80-1 CPD 194. FPR §§ 1-2.404-2(a) and (b) (1964 ed. Amendment 121) provide that any bid which fails to conform to the essential requirements of the IFB, such as the delivery schedule, shall be rejected as nonresponsive and that a bid shall be rejected where a bidder imposes conditions which would modify the IFB. This Office has long acknowledged the materiality of completion schedules and dates and the substantial effect they may have on the competitive position of bidders. See 53 Comp. Gen. 320 (1973); 53 *id.* 32 (1973); 51 *id.* 518 (1972); Memory Display Systems Division of the EdnaLite Corporation, B-187581, January 28, 1977, 77-1 CPD 74.

[Although the provision "Delivery -- 75-90 days ARO" may not have precluded a 75-day delivery period, it also would have permitted the contractor to have taken up to 90 days to deliver the supplies. Since this was a material deviation from the terms of the IFB, the bid was nonresponsive. The FAA is correct in its observation that the responsiveness of the bid must be determined on the face of the bid as received and that bidders cannot cure such deficiencies by discussions with the contracting officer after bid opening.]

ASC's assertion that Goff's bid was "fraudulent" is based upon that bidder's erroneous representation that it was offering supplies manufactured by a small business concern. However, there is no evidence in the record before us that this entry was made with the intent to deceive the Government. Moreover, ASC has not been prejudiced by the erroneous representation since ASC's bid was nonresponsive.

ASC's contention that the procuring agency here relaxed the delivery requirements of the IFB after award of the contract is not supported by the facts before us. The IFB required delivery within "75 days after contractor receipt of the contract." The record indicates that the procuring agency gave Goff until October 1, 1980, to perform the contract, and that the contract was mailed to Goff on July 16, 1980. Allowing a minimum of one day for Goff to receive the contract, it is evident that the procuring agency allowed Goff 75 days for completion of the contract as permitted by the IFB.

The protest is denied.



For the Comptroller General
of the United States